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Supreme Court, U.S.
FILED

No. 101097

MAR 7 - 2011

In The OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

TECO BARGE LINE, INC.,
n/k/a U.S. UNITED BARGE LINE, L.L.C.,

Petitioner,

v.

JUSTIN P. WILSON, TENNESSEE COMPTROLLER OF THE TREASURY, and the ASSESSMENT APPEALS COMMISSION of the STATE BOARD of EQUALIZATION,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee at Nashville

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PETITION FOR WRIT OF CERTIORARI

Everett B. Gibson*
Bateman Gibson, L.L.C.
65 Union Avenue, Suite 1010
Memphis, TN 38103
(901) 843-2463
everett@batemangibson.com
*Counsel of Record

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED FOR REVIEW

Whether the fourth prong of the *Complete Auto Transit* standard requires that a state actually provide services for an entity operating in interstate commerce to justify state or local taxation of the entity?

Rule 29.6 Corporate Disclosure Statement

U.S. United Barge Line, L.L.C., ("United") is a limited liability company, not a corporation. None of the members owning an interest in United is a publicly held company.

List of Parties

1. TECO Barge Line, Inc., n/k/a U.S. United Barge Line, L.L.C., Petitioner;

2. Justin P. Wilson, Tennessee Comptroller of the Treasury, Respondent;

3. Assessment Appeals Commission of the State Board of Equalization, Respondent.

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OPINIONS BELOW

The order of the Tennessee Supreme Court filed on December 7, 2010, is reprinted in the Appendix hereto, p. 1a.

The opinion of the Court of Appeals of Tennessee at Nashville filed on July 9, 2010, is not reported, but can be found electronically at Lexsee 2010 Tenn. App. Lexis 435. The opinion is reprinted in the Appendix hereto, p. 2a.

The final decision and order of the Assessment Appeals Commission of the State Board of Equalization filed on June 19, 2009, is not reported. The opinion is reprinted in the Appendix hereto, p. 35a.

The initial decision and order of the administrative judge filed on November 25, 2008, is not reported. The opinion is reprinted in the Appendix hereto, p. 54a.

JURISDICTION

On November 25, 2008, the administrative judge appointed by the State Board of Equalization filed her initial decision and order dismissing petitioner's appeal of its Tennessee tax assessment for 2005.

On June 18, 2009, the Assessment Appeals Commission of the State Board of Equalization filed its final decision and order. In that opinion, the

Commission denied relief for petitioner's Commerce Clause claims.

On July 9, 2010, the Court of Appeals of Tennessee at Nashville filed its opinion affirming the Assessment Appeals Commission on the Commerce Clause issues.

On December 7, 2010, the Tennessee Supreme Court denied petitioner's application for permission to appeal the Court of Appeals decision.

The jurisdiction of this Court to review the judgment of the Court of Appeals of Tennessee at Nashville is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Congress shall have the power...

To regulate commerce with foreign nations, and among the several states, and within Indian tribes.

Commerce Clause, U.S. Const., Art. I, § 8, cl.3.

STATEMENT OF THE CASE

A. Background

In 2007 United acquired all of the assets and assumed all of the liabilities of TECO Barge Line, Inc. ("TECO"). Included in the acquisition was the purchase of TECO's Tennessee tax appeal rights. TECO was formerly known as Mid-South Towing Company. Its name was changed by charter amendment to TECO in 2002.

Transportation companies, like TECO, are assessed annually in Tennessee for property tax purposes by a State officer, the Comptroller of the Treasury. Tenn. Code Ann. § 67-5-1301. In actual practice, the comptroller has delegated appraisal and assessment duties to a sub-agency under the comptroller's supervision called Office of State Assessed Properties ("OSAP").

TECO was and its successor is a water transportation carrier that operates a barge line principally on the Illinois, Mississippi and Ohio Rivers. The barge line has virtually no contact with Tennessee except to traverse on a regular basis up and down the Mississippi River alongside the bank of the river forming the western boundary of Tennessee. Because of this faint contact with the state, there was no effort by Tennessee to assess TECO's river marine property until 2000.

During the year of 2000, OSAP sent to TECO, then named Mid-South Towing Company, a

questionnaire to complete regarding contacts with Tennessee. TECO engaged counsel to reply to OSAP. Upon counsel's representation to OSAP staff that TECO neither owned nor leased property located in Tennessee, OSAP agreed that TECO would not be required to file OSAP's equivalent of a property tax return, called the ad valorem tax report. Record Exhibit 3. OSAP's request for a questionnaire was repeated in 2002 and, again, based upon TECO's counsel's representation that TECO neither owned nor leased property located in Tennessee, OSAP agreed that TECO need not file an ad valorem tax report. Record Exhibit 4.

That changed in 2005. OSAP insisted that TECO file an ad valorem tax report in spite of counsel's representation that TECO still neither owned nor leased property located in Tennessee. TECO complied and filed the tax report. Based upon the information contained in the report, OSAP issued a notice of assessment to TECO in August 2005.

B. Administrative Hearing

The notice of assessment was misaddressed by OSAP. When TECO discovered that an assessment notice had issued, TECO requested the State Board of Equalization to allow TECO to file its appeal to the State Board out of time. The State Board agreed that TECO could do so.

The State Board has the power by statute to refer tax appeals for a decision to the Assessment

Appeals Commission. Tenn. Code Ann. § 67-5-1502. That commission, in turn, may refer the parties to an administrative judge to conduct a record making proceeding as a contested case under the Tennessee Administrative Procedures Act. Tenn. Code Ann. § 67-5-1505. Both such referrals occurred in this case. TECO's contested case appealing its 2005 assessment was tried before an administrative judge at a hearing that occurred on January 7, 2007. By then, the 2006 tax assessment had been noticed and appealed. It was agreed that the results in the 2005 tax year case would control the results in the 2006 tax year case.

There were three issues before the administrative judge: (1) Did the State of Tennessee lack the power to assess TECO because of the Dormant Commerce Clause rule enunciated in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), in that the State of Tennessee provided TECO with no services; (2) Did the assessment exceed the powers granted to OSAP under state statute; (3) Did OSAP retaliate against TECO in violation of TECO's First Amendment rights to redress by issuing back assessments for tax years 2003 and 2004?

At the hearing, TECO established these undisputed facts:

1) Unlike other transportation companies, such as railroads and motor carriers, a water transportation carrier in transit receives no support or services from the State of

Tennessee or its governmental subdivisions. The reasons are quite simple. The waterways used by water transportation carriers are improved and maintained by the United States Army Corps of Engineers; the waterways are policed by the United States Coast Guard.

2) In Tennessee, there is not even fire protection afforded to water transportation carriers while in transit. For that reason federal regulations require that all towboats be equipped with fire suppressant systems and that the towboat crew members be certified to operate the system. 46 C.F.R. § 27.203.

3) TECO did have two barges loaded by Tennessee customers on the Tennessee River in 2005. These barges were transported to and from the customers by an interlining water carrier. TECO also loaded 17 barges on the Mississippi River in Tennessee in 2005, but those were swap-outs, loans of barges to another carrier that ran short of equipment. 99.7% of TECO's barge activity in 2005 had no connection to Tennessee except to go up and down the Mississippi River alongside the western shore line of Tennessee.

4) TECO did not purchase any supplies from Tennessee vendors in 2005, nor did it purchase any repair services from Tennessee vendors in 2005.

5) Water transportation carrier management members meet regularly with Corps of Engineers officials to discuss infrastructure needs. No representative of any state or local government ever attends any of these meetings.[1]

The administrative judge filed her initial decision and order on November 25, 2008, ruling against TECO on all issues. To keep its appeal alive, TECO was required to file exceptions with the Assessment Appeals Commission to the initial decision and order within 15 days. Tenn. Code Ann. § 4-5-315(b). TECO did so. The appeal then went to the Assessment Appeals Commission.

C. Administrative Review

The parties agreed that the appeal would be submitted to the Assessment Appeals Commission on the record before the administrative judge. The commission heard argument of counsel on April 21, 2009. By that time, there were additional appeals pending for tax years 2007 and 2008. The parties agreed that the results before the Assessment Appeals Commission in the 2005 tax year appeal would control the results of the 2007 and 2008 appeals.

Following argument of counsel, the Commission deliberated in open session and

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[1] These facts were established by testimony on the Record, at pp. 102-111.

affirmed the initial decision and order of the administrative judge. Two members of the five member commission dissented on the retaliation issue. A taxpayer in Tennessee may bypass the State Board of Equalization and seek judicial review in the courts of a decision of the Commission. If the taxpayer is a centrally assessed taxpayer, judicial review goes directly to the Court of Appeals of Tennessee at Nashville. Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii). TECO followed this option, bypassed the State Board and appealed directly to the Court of Appeals.

D. Appellate Review

The Court of Appeals filed its opinion on July 9, 2010. TECO had abandoned its state statute contention at oral argument before the Court of Appeals. That court ruled against TECO on its Commerce Clause argument but reversed the Commission on the First Amendment/retaliation argument and granted TECO full relief on that issue.

TECO filed in the Tennessee Supreme Court an application for permission to appeal the Commerce Clause issue on September 7, 2010. The court denied the application on December 7, 2010.

REASONS WHY CERTORARI SHOULD BE GRANTED

I.

Review is warranted because a nationally binding rule of law is needed for all state and local tax practitioners, public and private, to apply the fourth prong of *Complete Auto Transit*

The unanimous decision by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), was a huge advance for state and local tax practitioners, both those representing public interests and those representing private interests. No longer would the validity of a state taxing statute under the Commerce Clause be tested by semantical distinctions with no practical effect. Rather, the validity of the taxing statute would be tested by a bright line, four pronged test. The tax passes Commerce Clause muster

> ...when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Complete Auto Transit v. Brady, at p. 279.

But are the lines of the four pronged test that bright? Controversy has arisen over the construction

of the fourth prong, that is the requirement that the tax be "fairly related to the services provided by the State." The argument, with wide acceptance, has been made that the fourth prong of the *Complete Auto Transit* test is a mere redundancy and that if the tax passed the "substantial nexus" test it necessarily follows that the tax is "fairly related to the services provided by the State."

Two commentators, for example, put it this way:

> It is not difficult to see why the fourth prong has become so insignificant. Any taxpayer with a substantial nexus to the taxing state (the first prong) would appear necessarily to benefit from police and fire protection, as well as the amorphous 'other advantages of civilization.' The fourth prong, as defined by the Court, has become wholly subordinated to the first.

Jesse H. Choper and Tung Yin, "State Taxation and the Dormant Commerce Clause: The Object-Measure Approach," 1998 Sup. Ct. Rev. 193, at p. 205.

Those commentators and others like them misconstrue this Court's decision in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). In *Commonwealth Edison*, the taxpayers and their power generating customers did raise the fourth prong in *Complete Auto Transit* as one of two

grounds for relief, but under circumstances entirely different from the facts in this case. The *Commonwealth Edison* group argued that the words "fairly related" imply that the amount of tax must be proportionate to the dollar value of the services provided to the taxpayer.

This Court rejected the argument that, under the fourth prong test, the dollar amount of the tax must fairly compare to the dollar amount of the value of the services provided by the State. This court observed that a tax is not an assessment of benefits. Rather, a tax is a means of distributing the costs of government and where imposed on interstate commerce, the measure of the tax must be reasonably related to the extent of the contacts with the State under the fourth prong and no more. The analysis is not a mathematical calculation of comparative value. The majority of the Court was persuaded that the intense activity of mining coal wholly within Montana fully justified the severance tax at issue.

Petitioner in this case argues squarely within the holding in *Commonwealth Edison*. Of course there are contacts with Tennessee when towboats and barges regularly pass through a major inland waterway that constitutes Tennessee's western border. But those contacts are so slight that those contacts impose no burden on the State, simply because federal agencies, the Corps of Engineers and the Coast Guard, provide all services needed to insure safe passage. No benefit, no tax. The argument in this case is entirely consistent with

Commonwealth Edison and fits the fourth prong of *Complete Auto Transit* precisely. It is easy to see why other modes of interstate transportation, such as motor carriers and railroads, may be required to pay a non-discriminatory tax without violation of the Commerce Clause. Motor carriers in particular could not operate without the expenditure of a State or political subdivision on highway maintenance, not to mention the benefit of police and fire protection. Railroads do maintain their own rights of way, but regularly benefit from local police and fire protection. Water transportation companies can also benefit from state and local government services if they have a large customer base in a state, or repair facilities, or sales offices, but none of these contacts with a state are present here. No benefit is the conclusion that must be drawn from this record.

In the state appellate court briefing in this case, respondents placed reliance upon this Court's decision in *Ott v. Mississippi Valley Barge Line*, 336 U.S. 169 (1949), to support the argument that water transportation companies should be treated no differently from other interstate carriers in judging whether those water transportation companies are subject to a state or local tax. TECO agrees, but only because of the facts in the *Ott* case. First, the opinion begins in the second sentence like this:

> Each [Appealing Taxpayer] has an office or agent in Louisiana but its principal place of business is elsewhere.

Ott v. Mississippi Valley Barge Line, at p. 170. In the next paragraph the Court described frequent loading and unloading of barges in the taxing State throughout the tax year or years in question. The *Ott* case was decided a little less than 20 years before *Complete Auto Transit*. Nevertheless, the result would be the same had *Ott* been decided after *Complete Auto Transit*. The contacts with the State in *Ott* were on a repeated basis, off the river and onto the shore, contacts completely different from the regular contacts in this case

Does this translate into a case that is "cert worthy," a case that merits the time and effort of this Court to resolve? Yes. For this reason: Although largely silent and hidden from view from most persons in a state, water transportation on the interstate waterways is an enormous component of national transportation product, 522.5 million short tons transported in 2009.[2] To wait until a body of case law has developed at a lower level would be a disservice to the water transportation industry. The application of the fourth prong in *Complete Auto Transit* is uniquely suited to this industry. Thirty-four years have passed since this Court wisely decided *Complete Auto Transit*. The way to apply the fourth prong to water transportation companies remains undecided at the national level. This case provides the Court with the opportunity to give to the water transportation industry the protection to which it is entitled under the Commerce Clause. This

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[2] U.S. Army Corps of Engineers Transportation Facts and Information (November 2010), p. 2, located at www.ndc.irw.usace.mil/factcard/temp/factcard10.pdf

case therefore meets the standards of the Court's Rule 10(c).

In addition to the foregoing, the decision of the Tennessee Court of Appeals conflicts with the decision of the Appellate Court of Illinois in *America River Transportation Co. v. Bower*, 813 N.E. 2d 1090 (Ill. App. Ct. 2004).

II.

Review is warranted because the record in this case consists of uncontested facts showing that the taxpayer in actual practice receives no services from the State of Tennessee or its local governmental units, a circumstance that presents this Court with a unique opportunity to provide a comprehensive construction of the fourth prong

Should the Court find the Commerce Clause issue in this case to be worthy of consideration for granting the writ of certiorari, this case is the ideal candidate for review. The Commerce Clause issue was from the inception a principal issue in the case and the Commerce Clause issue on the record in this is based entirely upon undisputed facts.

TECO is a water transportation carrier with a fleet of 20 towboats and 700 barges. It is an inland marine carrier operating on the Illinois, Ohio and Mississippi Rivers. Although it passes the state of Tennessee regularly on the Mississippi River, where the river is the western boundary of the State, it does not originate or terminate cargo on the Mississippi

River in Tennessee. It has no repair facilities or repair vendors in Tennessee. It does not purchase any supplies in Tennessee. It neither owns nor leases any property in Tennessee. Where Tennessee is concerned, TECO just goes up and down the Mississippi River, in transit on the river all of the time.

Tennessee does not provide any services to water transportation companies like TECO that only pass through a boundary river of the State. The waterway is improved and maintained exclusively by the United States Army Corps of Engineers. All police services are provided by the United States Coast Guard. The State and its political subdivisions don't even provide fire protection for towing companies in transit. Water transportation companies are required by law to equip their towboats with fire suppressant systems and to crew their boats with employees who are certified to operate the system. If a fire were to get out of control, the towboat crew would not call a local government for help. The towboat crew would call another towboat for help.

A towing company's investment in towboats and barges is quite large. For this reason, and in furtherance of their water transportation businesses, the management of these towing companies meet regularly with representatives of the Corps of Engineers to discuss infrastructure needs. No state or local government representative ever attends these meetings. All government activities of any nature concerning the transit of goods by water

transportation companies in the regular course of business on the inland waterways is federal government activity.

TECO was assessed in Tennessee for ad valorem taxes for the first time in 2005. The record before the administrative judge that also constituted, by agreement of the parties, the record before the Assessment Appeals Commission is based upon the 2005 assessment.

TECO does not operate towboats on the Tennessee River. During that year, 2005, two barges owned by TECO were loaded on the Tennessee River, but in both cases the barges were transported by towboats operated by interlining carriers. TECO did not load any barges on the Cumberland River in Tennessee in 2005. The Cumberland is the only other navigable waterway in Tennessee.

In 2005, TECO did load 17 barges on the Mississippi River, but in most, if not all instances, those were "swap-outs," where TECO loaned equipment to another towing company that had a shortage of equipment in the area. In all, 99.7% of TECO's barge loadings in 2005 were outside of Tennessee.

On these facts TECO contends that Tennessee is prohibited by the Dormant Commerce Clause from levying an ad valorem tax on its marine property operated in transit. The facts in this case are compelling. How can Tennessee justify a tax on interstate commerce when no benefits have been

conferred? Fair share is a right and proper reason to tax interstate commerce. But the tax in this case amounts to overreaching in violation of constitutional standards and should be prohibited by this Court.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

Everett B. Gibson*
Bateman Gibson, L.L.C.
65 Union Avenue, Suite 1010
Memphis, TN 38103
(901) 843-2463
everett@batemangibson.com

*Counsel of Record

APPENDIX A

IN THE SUPREME COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

TECO BARGE LINE, INC., N/K/A U. S. UNITED BARGE LINE, LLC

v.

JOHN G. MORGAN, TENNESSEE COMPTROLLER OF THE TREASURY

No. M2009-01675-COA-R12-CV
December 7, 2010, Filed

ORDER

Upon consideration of the application for permission to appeal of Teco Barge Line, Inc., n/k/a United Barge Line, LLC and the record before us, the application is denied.

PER CURIAM

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

April 16, 2010, Session

TECO BARGE LINE, INC., N/K/A U. S. UNITED BARGE LINE, LLC

v.

JUSTIN P. WILSON, TENNESSEE COMPTROLLER OF THE TREASURY, ET AL.

Appeal from the Tennessee State Board of Equalization Assessment Appeals Commission
Kelsie Jones, Executive Secretary

No. M2009-01675-COA-R12-CV
July 9, 2010, Filed

Taxpayer, an interstate water transportation carrier company operating boats and barges over various waterways including the Mississippi and Tennessee Rivers, was assessed an ad valorem tax on personal property for the tax [*2] year 2005. Taxpayer appealed the assessment to the State Board of Equalization. Following the filing of Taxpayer's appeal, Taxpayer was retroactively assessed for the two tax years immediately preceding the original assessment, 2003 and 2004. Taxpayer appealed these assessments as well as assessments in subsequent tax years 2006, 2007 and 2008. A hearing was held before an Administrative Law

Judge, who upheld both the regular as well as the retroactive assessments. Taxpayer appealed to the State Board of Equalization Assessment Appeals Commission and, following a hearing, the Commission affirmed the ALJ's decision. Taxpayer appeals; we affirm in part and reverse in part.

Tenn. R. App. P. 12 Direct Review of Administrative Proceedings by the Court of Appeals; Judgment of the Tennessee State Board of Equalization Assessment Appeals Commission Affirmed in Part, Reversed in Part.

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Everett B. Gibson and Joni K. Roberts, Memphis, Tennessee, for the appellant, TECO Barge Line, Inc. n/k/a U.S. United Barge Line, LLC.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Mary Ellen Knack, Senior Counsel, for the appellees, Tennessee Comptroller of the Treasury and the Assessment Appeals Commission of the State Board of Equalization.

OPINION

I. Background

The Appellant, TECO Barge Line, Inc. n/k/a U.S. United Barge Line, LLC ("United"), [1] is a water transportation carrier company registered with the U.S. Army Corps of Engineers that owns and operates tugboats and barges for hire over waterways throughout the central and southeastern portions of the United States. United's barges mostly carry coal, grain, aggregate grain and steel over the Ohio, Illinois and Mississippi Rivers. Within Tennessee, the majority of United's boats and barges traverse the [*3] Mississippi River, though it regularly utilizes the Tennessee River for its barges traveling between Alabama and Kentucky. United is not domiciled in Tennessee nor does it own or lease any real property in Tennessee.

In 2000 and 2002, the Office of State Assessed Properties ("OSAP"), a division of the Tennessee Comptroller of the Treasury, sent an ad valorem tax report questionnaire to United to determine United's tax liability. United completed and returned the questionnaires each year, but OSAP did not assess any tax in those years. In 2005,

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[1] In the Fall of 2007, U.S. United Barge Line, LLC, acquired all of the assets of TECO Barge Line, Inc., including its rights of appeal in this case. Prior to 2002, TECO Barge Line, Inc., was named Mid-South Towing Company, Inc., which was changed by charter amendment in 2002.

OSAP again required United to complete an ad valorem tax report questionnaire and in July 2005, OSAP issued a notice assessing an ad valorem personal property tax for the 2005 tax year. [2] United appealed the assessment to the Tennessee State Board of Equalization. [3] In August 2006, OSAP assessed United for the tax year 2006 and retroactively assessed or "back assessed" United [*4] for tax years 2003 and 2004. United also appealed these assessments, which were then consolidated with United's appeal of the 2005 assessment.

In January 2008, a hearing was conducted by an Administrative Law Judge to consider United's appeal of the 2005 and 2006 assessments as well as the 2003 and 2004 back assessments. The ALJ determined that United was subject to taxation under Tenn. Code Ann. § 67-5-1301 because it is a water transportation carrier company that operates boats and barges over the waterways of Tennessee for hire that is also registered with the U.S. Army Corps of Engineers; [*5] consequently, the ALJ upheld the tax assessments for 2005 and 2006. The

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[2] The notice was not received by United because it was directed to the incorrect zip code; United learned of the assessment through a conversation with an OSAP analyst on September 28, 2005.

[3] Despite being untimely under the statute, United requested in letter to the Board of Equalization on October 24, 2005, that the Board defer "certification" of the assessment and allow United's appeal due to fact that United did not receive proper notice of the assessment. Although the record contains no response from either OSAP or the Board, it is apparent that the Board allowed United's appeal to go forward.

ALJ found that OSAP had the authority to retroactively assess taxes and found no proof that OSAP had selectively enforced its authority or issued the back assessments in retaliation for United's appeal of the 2005 assessment; the ALJ found, therefore, that United was liable for the 2003 and 2004 assessments. United appealed the ALJ's decision to the Assessment Appeals Commission of the State Board of Equalization. Following a hearing, the Commission issued its Final Decision and Order, which upheld the tax assessments for 2005 through 2008 [4] on the grounds that United was properly classified as a water transportation carrier company and that application of the classification statute did not violate the Commerce Clause; the decision also upheld the back assessments for 2003 and 2004 finding insufficient proof to establish a constitutional violation. United appeals the Commission's Final Decision and Order.

II. Standard of Review

This is a direct appeal from a final decision of the Tennessee State Board of Equalization Assessment Appeals Commission pursuant to Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii). Judicial review of decisions of commissions is governed by the narrow standard contained in Tenn. Code Ann. § 4-5-322(h) rather than the broad standard of review used in other civil appeals. *Wayne County v. Tenn. Solid*

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[4] United was assessed ad valorem property taxes by OSAP in 2007 and 2008 for those tax years. United appealed of each of these assessments, which appeals were consolidated with United's original appeal of the 2005 [*6] tax assessment.

Waste Disposal Control Bd., 756 S.W.2d 274, 279-80 (Tenn. Ct. App. 1988). A court may modify or reverse the decision of the commission if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> 1) In violation of constitutional or statutory provisions;
>
> 2) In excess of the statutory authority of the agency;
>
> 3) Made upon unlawful procedure;
>
> 4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> 5) (A) Unsupported by evidence which is both substantial and material in the light of the entire record.
>
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but [*7] the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

III. Analysis

As a preliminary matter, we must determine the extent to which the Commission had the authority to consider and decide United's challenge to the assessments on the constitutional bases asserted. The matter before us was brought before the Board of Equalization to challenge the classification of the taxpayer and the resulting assessment of taxes imposed in 2005 and subsequent years pursuant to Tenn. Code Ann. § 67-5-1301. In addition, United challenged the assessment of taxes for 2003 and 2004, which were imposed pursuant to the power granted at Tenn. Code Ann. § 67-1-1002.

The powers of the state board of equalization are set forth at Tenn. Code Ann. §§ 4-3-5103 and 67-1-305. Under both statutes, the board is authorized, *inter alia*, to consider evidence and determine appeals relative to the "value, classification and assessment of property." [5] The ability of

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[5] The language of Tenn. Code Ann. § 4-3-5103 applicable to the instant proceeding is as follows:

> The state board of equalization has the following duties and functions to: . . . (4) Receive, hear, consider and act upon complaints and appeals made to the board regarding the [*9] valuation, classification and assessment of property in the state;....

The applicable language of Tenn. Code Ann. § 67-1-305 is:

> (a) The board is vested with the power to : . .
>
> .
>
> (2) Obtain such evidence, information and statistics as may be deemed material as to

administrative tribunals such as the board to hear constitutional claims was before our Supreme Court in *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008), and [*8] the following discussion gives guidance to our consideration of this question:

> Administrative tribunals do not lack the authority to decide every constitutional issue. It is essential, however, to distinguish between the various types of constitutional issues that may arise in an administrative context. In *Richardson [v. Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995)], we developed three broad categories of constitutional disputes: (1) challenging the facial constitutionality of a statute authorizing an agency to act or rule, (2) challenging the agency's application of a statute or rule as unconstitutional, or (3) challenging the constitutionality of the procedure used by an agency. [Citation omitted]. Administrative tribunals have the power to decide constitutional issues falling into the second and third categories, but the first category falls exclusively within the ambit of the judicial branch.

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the values, classifications and assessments of properties to be equalized.

263 S.W.3d at 843.

Before the Commission, United contended that the tax imposed by Tenn. Code Ann. § 67-5-1301, as applied to it, violated the Commerce Clause of the U.S. Constitution. [6] United also contended that taxes assessed pursuant to Tenn. Code Ann. § 67-1-1002 were imposed in retaliation for its appeal of the 2005 assessment, thereby penalizing United for the exercise of its First Amendment right to petition for the redress of grievances. The Commission rejected the constitutional challenges and upheld both assessments. In so doing, the Commission acknowledged that United was not making a facial attack on the constitutionality of Tenn. Code Ann. §§ 67-5-1301 or 67-1-1002. The Commission properly confined its consideration of the constitutional concerns to the limits set in *Colonial Pipeline*.

Our review of the Commission's decision necessarily involves a three-step analysis. *McEwen v. Tenn. Dept. of Safety*, 173 S.W.3d 815, 820 (Tenn. Ct. App. 2005). We first determine whether the

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6. In addition to its "as applied" constitutional claim, United also asserted [*10] before the Commission that its classification as a water transportation carrier company under Tenn. Code Ann. § 67-5-1301(a)(13) was improper based on United's interpretation of the language of the statute. The parties' appellate briefs included arguments on this issue; however, during oral argument, United's attorney informed the Court that it did not intend to pursue its statutory construction argument. Consequently, we do not address the parties' statutory construction arguments.

Commission identified the appropriate legal principles applicable to the case and then examine the Commission's factual findings, if any, to determine whether the findings are supported by substantial and material evidence. *Id.* Finally, we examine how the Commission applied the law to the facts. *Id.* The application of the law to the facts is a highly judgmental process involving mixed questions of law and fact. *Miller v. Civil Service Comm'n of Metropolitan Government of Nashville and Davidson County*, 271 S.W.3d 659, 664 (Tenn. Ct. App. 2008) [*11] (citing *Armstrong v. Metro. Nashville Hosp. Auth.*, No. M2004-01361-COA-R3-CV, 2006 Tenn. App. LEXIS 381, 2006 WL 1547863, at *2 (Tenn. Ct. App. Jun. 6, 2006). Consequently, courts may neither reweigh the evidence nor substitute their judgment for the commission's, rather courts "must determine whether a reasonable person could appropriately have reached the same conclusion reached by the commission, consistent with a proper application of the controlling legal principles." *Miller*, 271 S.W.3d at 664; *McEwen*, 173 S.W.3d at 820.

Commerce Clause Claim

In determining Commerce Clause challenges, we are instructed by the U.S. Supreme Court to evaluate the validity of state law pursuant to the four-pronged standard established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Under the *Complete Auto* test, state taxes are upheld as nonviolative of the federal Commerce Clause

provided that (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id.* at 279; *accord Maryland v. Louisiana*, 451 U.S. 725, 754, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981); *see also General Motors Corp. v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964); [*12] *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959); *Memphis Gas Co. v. Stone*, 335 U.S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267 (1940). In announcing this four-part test, "the court . . . rejected the line of cases holding that the direct taxation of interstate commerce was impermissible and adopted instead a 'consistent and rational method of inquiry [that focused on] the *practical effect* of [the] challenged tax.'" *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 303-04, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (quoting *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 443, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980)) (emphasis added).

The Supreme Court made it clear in *Quill Corp.* that the "four-part test [of *Complete Auto*] . . . continues to govern the validity of state taxes under the Commerce Clause" and confirmed that under our current Commerce Clause jurisprudence, "with certain restrictions, interstate commerce may be required to pay its fair share of state taxes." 504 U.S.

at 310; *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce [*13] from their just share of [the] state tax burden even though it increases the cost of doing business.").

United does not assert that the tax assessment at issue discriminates against interstate commerce or that it was unfairly apportioned in this case; rather, United contends that the assessment violates the first and fourth prong of the *Complete Auto* test. We, therefore, address these specific contentions.

1. Substantial Nexus

The tax at issue, Tenn. Code Ann. § 67-5-1301, authorizes and directs the comptroller of the treasury to assess for taxation property within the state that is owned, used, and/or leased by certain types of companies including:

> water transportation carrier companies which operate boats and barges over the waterways of this state for hire, which are registered with the United States army corps of engineers or any other federal or state agency and/or domiciled in this state and/or owning or leasing real

> or personal property located in this state.

Tenn. Code Ann. § 67-5-1301(a)(13). The tax expressly applies only to property used within the State.

United's President, David O'Neill, testified before the ALJ that, during the tax years at issue, United owned and operated [*14] 20 tugboats and 700 barges, which principally traveled over the Ohio, Illinois and Mississippi Rivers, including the portion of the Mississippi River that flows through Tennessee. Mr. O'Neill explained that 95-98 percent of United's operations within Tennessee consisted of boat and barge traffic on the Mississippi River. The other two to five percent consisted of barges that traveled over the Tennessee River from points in Alabama, through Tennessee, to a facility owned by United in Paducah, Kentucky; United did not operate any tugboats on the Tennessee River. Mr. O'Neill testified that in 2005, the first year the tax was assessed, United loaded forty-four barges in Alabama that traveled through Tennessee along the Tennessee River destined for Kentucky; United loaded two barges on the Tennessee River within Tennessee borders. With respect to loadings on the Mississippi River, Mr. O'Neill testified that none of United's barges terminated in Tennessee, but that in 2005, United had seventeen loadings of products originating from Tennessee; Mr. O'Neill did not testify as to the total number of United's boats and barges that traveled on the Mississippi River

through Tennessee in 2005. Mr. [*15] O'Neill testified that the loadings in Tennessee were not scheduled or part of United's "normal operating procedure"; rather, they were done at the request of other barge lines and only represented .02-.03 percent of United's 5,561 barge loadings system wide. While United's loadings within Tennessee represented a small portion of its system-wide loadings, Mr. O'Neill's testimony supports the Commission's determination that United regularly traveled within Tennessee over the Mississippi and Tennessee Rivers to conduct its boat and barge operations during the tax years in question.

United contends, without citation to any authority, that "[v]essels must habitually use a state's *ports* in substantial numbers to justify requiring the vessels to share in the tax burden." (Emphasis added). United argues that substantial use of a state's ports, as opposed to merely "regular traffic," should be the basis for finding a substantial nexus with respect to taxes levied on boats and barges because boats and barges floating along a river do not burden a state's infrastructure to the same extent as trucks or railroads.

We find no support for such a contention in either state or federal law. To the contrary, [*16] the U.S. Supreme Court has repeatedly held that water transportation carriers are held to the same constitutional standards as other interstate transportation carriers. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174, 69 S. Ct. 432, 93 L. Ed. 585 (1949) ("We can see no reason which

should put water transportation on a different constitutional footing than other interstate enterprises."); *Standard Oil Co. v. Peck*, 342 U.S. 382, 384, 72 S. Ct. 309, 96 L. Ed. 427, 63 Ohio Law Abs. 559 (1952). Since *Ott*, both state and federal courts have held that regular traffic through a state, including boat and barge traffic over a state's waterways, is sufficient to create a substantial nexus. *See Central R.R. Co. of Pa. v. Commonwealth of Pa.*, 370 U.S. 607, 614, 82 S. Ct. 1297, 8 L. Ed. 2d 720 (1962); *Braniff Airways, Inc. v. Nebraska Board of Equalization*, 347 U.S. 590, 600, 74 S. Ct. 757, 98 L. Ed. 967 (1954); *Standard Oil*, 342 U.S. at 384; *Jack Cole Co. v. Ellington*, 52 Tenn. App. 120, 372 S.W.2d 204, 208 (Tenn. Ct. App. 1961); *see also Union Barge Line Corp. v. Marcum*, 360 S.W.2d 130, 132-33 (Ky. Ct. App. 1962).

In *Central Railroad*, the U.S. Supreme Court, relying in part on its prior ruling in *Standard Oil*, held that "the State through which the regular traffic flowed could impose a property tax measured by some fair apportioning formula." *Central R.R. Co. of Pa.*, 370 U.S. at 614. [*17] The Court noted that the record in *Standard Oil* showed that the boats and barges which Ohio sought to tax in full had been traveling along three regular routes on the Mississippi and Ohio Rivers: from Memphis, Tennessee, to Mt. Vernon, Indiana; from Memphis, Tennessee, to Bromley, Kentucky; and from Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky. The Court then observed that "[t]he States in which the vessels landed, *as well as those through which they regularly traveled, could*

undoubtedly have traced these regular trips and levied appropriately apportioned ad valorem taxes." Id. at 615, n. 6 (emphasis added). Applying the principles of *Central Railroad* to this case, we find that United's regular traffic over both the Mississippi and Tennessee Rivers through the State of Tennessee provide the substantial nexus required to allow Tennessee to impose a property tax measured by a fair apportioning formula.

United also suggests that, because more than 95 percent of its River traffic within Tennessee is on the Mississippi River and since the Mississippi River is a federally regulated waterway, there is insufficient nexus with Tennessee. This argument also lacks merit. While [*18] it is true that navigation of the Mississippi River is regulated by Congress, such regulation does not divest Tennessee of title to the beds and banks of the river or the authority to tax vessels traveling over the river through the territory of the State. *See, e.g., Braniff,* 347 U.S. at 596-97. In *Braniff,* the U.S. Supreme Court analogized planes flying interstate with boats traveling inland waters and explained a state's authority to tax such enterprises thusly:

> The commerce power, since *Gibbons v. Ogden,* 22 U.S. 1, 9 Wheat. 1, 193, 6 L.Ed. 23, has comprehanded [sic] navigation of streams. Its breadth covers all commercial intercourse. But the federal commerce power over navigable streams does not prevent

> state action consistent with that power. Since, over streams, Congress acts by virtue of the commerce power, the sovereignty of the state is not impaired. The title to the beds and the banks are in the states and the riparian owners, subject to the federal power over navigation. Federal regulation of interstate land and water carriers under the commerce power has not been deemed to deny all state power to tax the property of such carriers.

Braniff, 347 U.S. at 596-97 (internal citations omitted); [*19] *see also Bean Dredging Corp. v. Olsen*, 742 S.W.2d 259 (Tenn. 1987) ("The boundary between Tennessee and Arkansas lies generally in the Mississippi River."); *Higman Towing Co. v. Cocreham*, 70 F.Supp. 628, 636 (D.C.La. 1947) ("[T]he fee of the beds of navigable waters became the property of the individual states when admitted into the Union, by virtue of their inherent sovereignty. This ownership, however, was subject to the paramount control of the Federal Government over navigation and commerce on those waters."). As aforestated, we find that United's habitual and systematic utilization of and presence on the waterways of Tennessee established a substantial nexus with Tennessee to subject United to the State's taxation.

2. Fairly Related to Services Provided

Under the *Compl·te Auto* test, a state's tax will be upheld if, along w .th the other three criteria, it is "fairly related to the services provided by the state." *Complete Auto Transit*, 430 U.S. at 279. "The validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which [it] bears a special relation." *Commonwealth Edison*, 453 U.S. at 625. There is no requirement, [*20] however, that the amount of the tax collected from a particular activity be reasonably related to the value of the services provided to the activity. *Id.* at 622. In *Commonwealth Edison*, the U.S. Supreme Court examined this prong of the *Complete Auto* test in detail and explained that:

> The relevant inquiry under the fourth prong of the *Complete Auto Transit* test is not . . . the *amount* of the tax of [sic] the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. Beyond that threshold requirement, the fourth prong of the *Complete Auto Transit*

> test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just" share of [the] state tax burden."

Id. at 626 (internal citations omitted). Consequently, the Court explained, "[t]he simple but [*21] controlling question is whether the state has given anything for which it can ask return." *Id.* at 625 (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. at 444).

United asserts that it "derives no benefits from state and local governments in its Tennessee operations with very few sporadic exceptions." United relies on Mr. O'Neill's testimony that United's boats and barges do not use local assistance while "in transit." United argues that it has no need for Tennessee emergency services such as police or firefighters as its boats and barges would use federal assistance if such services were needed while in transit. [7] United also asserts that it does not regularly purchase supplies from vendors located in

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[7] Mr. O'Neill testified that if United was in need of law enforcement, it would contact the U.S. Coast Guard. He also testified that under federal law, water transportation companies like United were required, as a condition to operate on inland waterways, to provide their own fire suppressant systems and certified fire suppressant operators.

Tennessee nor does it regularly use any maintenance or repair facilities located in Tennessee. Finally, United again attempts to distinguish its operation of vessels over inland waterways from those of railroads and trucks that travel across the state on rails and roads by asserting that the Federal government, not the State, maintains and controls navigation of the Mississippi River. United asserts that its boats and barges "just go[] up and down a river contiguous to Tennessee without [*22] stopping, without taking on crew, without taking on provisions and without obtaining repairs or maintenance services."

United's attempt to quantify the exact services, such as police and fire protection, that it does not regularly use while traversing the State is misplaced. United's actual use or non-use of these services is irrelevant to the inquiry. *See Commonwealth Edison*, 453 U.S. at 628. So long as there is some service or benefit provided by the State and the tax levied is apportioned to the extent of the contact with the State the tax does not run afoul of the Commerce Clause. *Id.* Further, we remain unpersuaded by United's argument that water transportation carriers are different from other interstate transportation carriers in the context of government provided services. We acknowledge that vessels traveling over inland waterways may not [*23] use all of the same services that vehicles traveling on an interstate highway or railroad may use, but such differences do not change the analysis as "interstate commerce may be required to contribute to the cost of providing *all* governmental

services, including those services from which it arguably receives no direct benefit." *Id.* at 628, n. 16. "The only benefit to which the taxpayer is constitutionally entitled [is] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Id.* at 628-29 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22, 57 S. Ct. 868, 81 L. Ed. 1245 (1937)).

The tax here was levied on United's personal property located within the State of Tennessee. There is no dispute that the tax was not properly apportioned to the property actually located within the borders of Tennessee. We find, therefore, that the tax is in "proper proportion" to United's activities within the State and, as a result, to its "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. *See Commonwealth Edison*, 453 U.S. at 626-27. Having also [*24] found that a substantial nexus exists between United and the State of Tennessee, we find that the ad valorem property tax assessments from 2005 through 2008 satisfy the four prongs of the *Complete Auto* test and, thus, are nonviolative of the Commerce Clause. Consequently, we affirm the Commission's Final Decision and Order holding the same.

First Amendment Claim

United argued before the Commission that, in assessing taxes for 2003 and 2004, OSAP selectively enforced Tenn. Code Ann. § 67-1-1002, *et.*

seq., in violation of the Equal Protection Clause of the Fourteenth Amendment and that such enforcement "evidence[d] retaliation for United's exercise of its First Amendment right to redress grievances." The majority of the Commission [8] found that there was "[in]sufficient proof to establish a constitutional violation," holding:

> We believe the assertion that OSAP's actions were vindictive or selective is not borne out by the record. The proof does not establish that [United] was singled out by OSAP and does not establish that OSAP's actions rested on an impermissible consideration or purpose. Nor can OSAP be estopped from carrying out is duty under Tenn. Code Ann. [§] 67-5-1301(c), 67-1-1002(a)(1), [*25] and 67-1-1005(a) on the basis of presumably innocent misinterpretations of the statue by its employees and/or [United].

On appeal, United does not assert that OSAP's assessment for prior tax years was selective, only that the back assessments were issued in retaliation for United's appeal of the original tax assessment in

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[8] Two of the five members of the Commission dissented from the conclusion that the back assessments for the years 2003 and 2004, as applied to United under the circumstances, were constitutionally sound.

2005, which United characterizes as its First Amendment right to redress grievances.

It is well-established that governmental action, which standing alone does not violate any law or constitution, may nonetheless be a tort if motivated in substantial part by a desire to punish an individual for exercise of a statutory or constitutional right. *See, e.g., Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (untenured teacher who could have been fired for no reason may nonetheless establish a claim if the decision not to rehire him was made because of his exercise of First Amendment freedoms); *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) [*26] (inmate moved allegedly in retaliation for his effort to litigate the claim of another inmate was actionable); *Board of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996) (nonrenewal of plaintiff's government contract in retaliation for his exercise of free speech is actionable); *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1225 (6th Cir. 1997) ("[A] claim of retaliation for exercise of the constitutional right of access is cognizable under [U.S.C.] § 1983."); *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994) ("retaliation under color of law for the exercise of First Amendment rights is unconstitutional").

A person making a claim that governmental action was improperly motivated, *e.g.*, in retaliation for that person's exercise of statutory or

constitutionally protected rights, bears the initial burden of establishing a *prima facie* case that the challenged action was so motivated. [9] *Mount Healthy*, 429 U.S. at 287; *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). This can be done either by presenting direct evidence of retaliation or through circumstantial evidence. In this case, the evidence relied upon by United in support of its claim was circumstantial. [*27] [10] When the claim is based on circumstantial

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[9] The analytical framework of such a challenge, as discussed more fully below, is essentially the same regardless of context (e.g., employment, prison, regulatory), allegation (e.g., discrimination or retaliation) or the grounds (e.g., common law, state or federal law or constitutional). See, e.g., Thaddeus-X, 175 F.3d at 399 (applying the *Mount Healthy* burden-shifting analysis to inmate First Amendment retaliation case and explaining that many other circuits have applied such in other non-employment cases); *McCray v. Vanderbilt Univ.*, No. M2008-00364-COA-R3-CV, 2009 Tenn. App. LEXIS 389, 2009 WL 1819247, at *5-6 (Tenn. Ct. App. Jun. 23, 2009) (applying the *McDonnell Douglas* burden-shifting analysis to Family and Medical Leave Act retaliation and common law retaliatory discharge claims); *Love v. Electric Power Bd. of Chattanooga*, No. 1:07-cv-80, 2009 U.S. Dist. LEXIS 46256, 2009 WL 1514436 (E.D. Tenn. May 29, 2009) [*28] (applying the *McDonnel Douglas* burden-shifting analysis to an age discrimination claim under the ADEA);

[10] Direct evidence is that evidence which, if believed, requires the conclusion that improper motive was at least a motivating factor in the governmental action, *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999), and does not require a fact finder to draw any inferences in order to conclude that the challenged action was motivated, at least in part, by the claimant's protected activity. *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003). When a plaintiff presents direct evidence of

evidence, such as the timing of events or the disparate treatment of similarly situated individuals, courts are to apply the burden-shifting analysis established in *McDonnell Douglas*. 411 U.S. at 802; *McClain v. Nw. Community Corr. Ctr. Judicial Corr. Bd.*, 440 F.3d 320, 332 (6th Cir. 2006); *see also Thaddeus-X*, 175 F.3d at 399.

Once the claimant has met the initial burden of establishing a *prima facie* case, the burden of going forward shifts to the governmental entity to articulate a legitimate, constitutional reason for [*29] the challenged action. *See McDonnell Douglas*, 411 U.S. at 802; *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If the entity comes forward with a legitimate, constitutional reason, the presumption of retaliation is rebutted and the burden of going forward returns to the claimant to produce sufficient evidence from which the fact-finder may reasonably reject the entity's explanation. *Burdine*, 450 U.S. at 255-56; *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir.1994). A claimant may show that the reason offered was mere pretext by demonstrating by a preponderance of the evidence either that the proffered reasons had no basis in fact or that a prohibited reason more likely than not motivated the entity. *Burdine*, 450 U.S. at

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discrimination or retaliation, the burden of both production and persuasion shifts to the governmental entity to prove that it would have taken the same action in the absence of the protected activity. *Mount Healthy*, 429 U.S. at 287; *Thaddeus-X*, 175 F.3d at 399; *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

252-53; *Terry v. Gallegos*, 926 F.Supp. 679, 693 (W.D. Tenn. 1996) (quoting *Manzer*, 29 F.3d at 1084); *see also McCray v. Vanderbilt University*, No.M2008-00364-COA-R3-CV, 2009 Tenn. App. LEXIS 389, 2009 WL 1819247, at *5-6 (Tenn. Ct. App. Jun. 23, 2009).

While the intermediate burdens of going forward shift back and forth under this framework, the ultimate burden of persuasion remains at all times with the claimant. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). [*30] In making a determination of whether the evidence proves a statutory or constitutional violation, "the court should consider reasonable inferences drawn from the totality of facts, the conglomerate of activities, and the entire web of the circumstances presented by the evidence on the record as a whole." *Gallegos*, 926 F.Supp. at 693 (citing *Ford v. Nicks*, 703 F.Supp. 1296, 1303 (M.D. Tenn. 1988)); *accord EEOC v. St. Joseph Paper Co.*, 557 F.Supp. 435, 439 (W.D. Tenn. 1983)).

Before engaging in the burden-shifting analysis, we must examine the record to determine the facts as the Commission did not make specific findings of fact.

In 2005, OSAP added seven companies, including United, to the master list of assessable water transportation carriers and assessed those companies the ad valorem property tax authorized at Tenn. Code Ann. § 67-5-1301 for the first time.

United appealed the assessment in accordance with Tenn. Code Ann. § 67-5-1327, first to the Comptroller of the Treasury and then to the State Board of Equalization for review pursuant to Tenn. Code Ann. § 67-5-1328. Within a year of United's original assessment and appeal, OSAP "back assessed" United ad valorem property taxes for [*31] the tax years 2003 and 2004 in accordance with Tenn. Code Ann. §§ 67-1-1002 and 1005. Gary Harris, OSAP Assistant Director of Assessments, testified that OSAP's policy or "routine" with respect to back assessments was to "giv[e] the benefit of the doubt to the taxpayer" in the initial year of discovery and, therefore, not issue a back assessment. Mr. Harris testified that of the 25 taxpayers added to OSAP's assessable master list between 1997 and 2006, only two were back assessed [per 67-1-1002]. One was United; the other was Alter Barge Line, which was "force assessed" because it had refused to complete and submit an ad valorem tax report questionnaire or to pay any of the taxes assessed. [11] The record also shows that of the companies originally assessed in 2005, as United was, United was the only one that appealed the assessment.

The foregoing circumstantial evidence established a *prima facie* case that the assessment of taxes for 2003 and 2004 may have been made in response to United's appeal of the 2005 assessment;

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[11] Alter Barge Line was not one of the new companies added in 2005.

[12] OASP was then required to articulate the reason for its decision to impose the back assessment. Barry [*32] Murphy, Director of OSAP testified that it was OSAP's responsibility when it discovered properties which had not been assessed "to go back to what the extent of the law would allow." In its argument, OSAP also relies on Tenn. Code Ann. § 67-1-1002 to support director Murphy's testimony that OSAP is required by the statute to back assess properties that have been omitted or escaped taxation. OSAP, therefore, satisfied its burden of production, which shifted the burden back to United to demonstrate by a preponderance of the evidence that these reasons were merely pretext for OSAP's improper motive. We, therefore, turn to a consideration of the entire evidence to determine if United met its burden of persuasion.

In deposition testimony of OSAP director Murphy, Gary Harris, the assistant director, Patricia Dodson, an analyst, and Shannon Tucker, an

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[12] Sufficient circumstantial evidence showing a causal connection between the protected activity and the challenged action raises an inference that an improper motive was, at least in part, a motivating factor in the decision to act. *See, e.g., Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 463 (6th Cir. 2001); *Walborn v. Erie County Care Facility*, 150 F.3d 584, 589 (6th Cir. 1998); *Lyons v. Metro. Gov't of Nashville and Davidson County*, No. 3:08-0804, 2009 U.S. Dist. LEXIS 69405, 2009 WL 2431430, at *6 (M.D. Tenn. Aug 07, 2009); [*33] *Harris v. Metro. Gov't of Nashville and Davidson County*, No. 3:04-0762, 2005 U.S. Dist. LEXIS 31410, 2005 WL 3143973, *4 (M.D. Tenn. Nov 23, 2005); *Sanders v. New York City Human Resources Admin.*, 361 F.3d 749 (2d Cir. 2004); *Heymann v. Tetra Plastics Corp.*, 640 F.2d 115 (8th Cir. 1981).

analyst, introduced at the hearing, several possible reasons why the six other companies added in 2005 were not back assessed were given, including that some additions may have represented name changes rather than new taxpayers, [13] that some may have been locally assessed for previous years, or that some may not have operated over Tennessee waterways for previous years. The OSAP employees, however, did not know whether any of these possible explanations actually applied to any of the six other companies added to the assessable master list in 2005. Consequently, this testimony had no probative value. Additionally, while Mr. Harris testified that "[i]f we can discover that that company did indeed operate on the waterways in Tennessee . . . we can go back and back assess the company," he also testified [*34] that it was OSAP's "routine" to give the taxpayer the benefit of the doubt the initial year that the taxpayer is discovered and not issue an assessment for previous tax years. When asked by United's counsel to explain the reason for the back assessment against United, Mr. Harris provided no explanation other than that United's appeal "had

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[13] Each year, OSAP conducted, what it called, a discovery process to discover new or previously unreported taxpayers. Mr. Tucker [*35] testified that any newly discovered taxpayer would be added to the assessable master listing in the year it was discovered. OSAP created a new assessable master listing each year. Mr. Tucker testified that when a taxpayer's name changed, whether as a result of a merger or acquisition or any other reason, the taxpayer's new name would be used in the next year's assessable master listing; however, the list did not indicate which taxpayers on the list were newly discovered taxpayers as compared to an existing taxpayer that simply changed its name.

nothing to do with the back assessment." Director Murphy testified that the assessment analyst was the person that would know whether a company had been operating over Tennessee waterways in previous years and would make the decision to issue a back assessment; however, the water transportation carrier analyst, Shannon Tucker, testified that either Mr. Harris or Mr. Murphy made the decision to back assess a company and that, in the case of United, "we got some ad valorem returns, and they were for back years, so I just went ahead and worked up what [Mr. Harris] told me to work up." Mr. Tucker also testified that the only back assessment he had ever done since he began working at OSAP in 2001 was that issued against United.

The preponderance of the evidence shows that the 2003 and 2004 assessments were imposed after United had exercised its right under Tenn. Code Ann. § 67-5-1327 to appeal the 2005 assessment to the board of equalization. Further, the evidence shows that United was the only water transportation carrier of the seven originally assessed in 2005 that exercised its statutory right to appeal the assessment and was the only one assessed back taxes. This evidence is sufficient to infer that the reexamination of United's operations prior to 2005 was prompted by the appeal and resulted in the assessment of taxes for 2003 and 2004, especially in light of [*36] OSAP's failure to explain why, in the case of United, it chose to deviate from its "routine" of giving the taxpayer the benefit of the doubt in the initial year of discovery and not issue an assessment for previous tax years. OSAP's

assertion that, from correspondence with United in 2000 and 2002, it knew that United was operating barges on Tennessee waterways prior to 2005 and that, pursuant to the statute, OSAP had a statutory duty to assess property that had escaped taxation, fails to rebut the inference that the decision to make the back assessment was predicated upon United's appeal of the 2005 assessment. [14] *See Wade, supra*, 259 F.3d at 463. Being unrebutted, the inference allows us to conclude that the 2003 and 2004 assessments were made as a result of United's appeal of the 2005 assessment. *See Gallegos, supra*, 926 F.Supp. at 693 ("Rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."); *see also Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990) (If the claimant proffered sufficient evidence to raise the inference that her protected activity was the likely reason for [*37] the adverse action and can subsequently show that the excuse offered for the action was merely a pretext for discrimination or retaliation, then a causal link is established and liability results); *Cf. Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir.1986); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793,

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[14] In 2000 and 2002, United provided OSAP with information about its operations and it was not added to the assessable master list in those years. The record showed that companies were only added to the assessable master list if the company was determined to be subject to the ad valorem property tax. The back assessment issued in 2005 for tax years 2003 and 2004 is inconsistent with the non-assessment in the years in which the information was provided to OSAP.

796 (9th Cir.1982); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).

The General Assembly, in enacting Tenn. Code Ann. §§ 67-5-1327 and 1328, expressly provided for a taxpayer's right to appeal tax assessments and the mechanism by which such right should be exercised. When a governmental entity acts in such a way that punishes or deters an individual or organization from exercising rights granted by the legislature of this State, such [*38] action is against the public policy of Tennessee. Accordingly, the Commission's holding based on constitutional grounds [15] relied on improper legal principles in addition to being made without reference to any factual findings. Having found evidence that, under the circumstances, the issuance of the back assessments violated United's statutory right to appeal the original assessment and, thereby, OSAP violated the public policy of Tennessee, we reverse that portion of the Commission's Final Order upholding the back assessment and absolve United of its liability for the ad valorem property assessments for tax years 2003 and 2004.

IV. Conclusion

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[15] While the Commission held generally that there was "[in]sufficient proof to establish a constitutional violation," it appears to have limited its legal analysis to United's claim under the Equal Protection Clause of the Fourteenth Amendment as the Commission's Final Decision and Order only referenced the elements of a selective or vindictive enforcement claim, which is a doctrine developed within equal protection law.

As aforestated, we find that the Commission correctly determined that Tenn. Code Ann. § 67-5-1301 as applied to United did not [*39] contravene the Commerce Clause of the United States Constitution and, consequently, we affirm the Commission's decision to uphold the ad valorem property tax assessments against United for the tax years 2005-2008. We must, however, reverse the Commission's decision to uphold the assessments for tax years 2003 and 2004 for the reasons set forth above.

Costs of the appeal are assessed to the parties equally.

RICHARD H. DINKINS, JUDGE

APPENDIX C

BEFORE THE TENNESSEE STATE BOARD OF EQUALIZATION ASSESSMENT APPEALS COMMISSION

In re:

TECO BARGE LINE, INC., n/k/a

UNITED BARGE LINE, LLC

State Assessed Property

Public Utility

Tax year(s) 2003-2004 (Back assessment)

Tax years 2005-2008

FINAL DECISION AND ORDER

Statement of the Case

This is an appeal by the taxpayer, a water transportation carrier company, from the initial decision and order of the administrative judge, who affirmed back assessments for tax years 2003-2004 and original assessments for 2005-2006 by the Comptroller of the Treasury through the Office of State Assessed Property (hereinafter "OSAP.") The appeal was heard in Nashville on April 21, 2009, before Commission members Creecy, Dooley, Stokes

(presiding), Wade, and Wills. [1] Everett B. Gibson, Esq., represented TECO Barge Line, Inc., formerly known as Mid-South Towing Company, and its successor, United Barge Line, LLC (hereinafter collectively referred to as "TECO.") John Allen, Esq., represented OSAP. The parties agreed to include before the Commission the tax year 2007 and 2008 appeals, which had not yet been heard by an administrative judge.

The administrative judge held that TECO was properly assessed pursuant to Tenn. Code Ann. § 67-5-1301(13) and that neither the assessments nor the back assessments violated federal constitutional principles. For the reasons expressed in the initial decision and order of the administrative judge and for the reasons expressed herein, we affirm.

Findings of Fact and Conclusions of Law

TECO is a water transportation carrier that operates tugboats and barges within Tennessee's borders over the Mississippi River and Tennessee River waterways. It transports bulk commodities such as grain and coal. In addition to tangible and intangible property within the state that is owned by enumerated types of carriers and utility companies, personal property used and/or leased by such companies is centrally assessed by OSAP on or before the first Monday in August of each year, pursuant to Tenn. Code Ann. § 67-5-1301 et seq.

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[1] Mr. Creecy sat as a designated alternate pursuant to Tenn. Code Ann. §4-5-302.

After an informal review process, appeal is made directly to the State Board of Equalization under Tenn. Code Ann. § 67-5-1328.

TECO argues the assessments were not authorized under Tenn. Code Ann. § 67-5-1301(13) and further that the assessments violated the Commerce and Due Process Clauses of the federal constitution. As to tax years 2003-2004, TECO also argues the back assessments constitute selective enforcement at odds with the First Amendment or Equal Protection Clauses under the Fourteenth Amendment.

As a preliminary matter, we are compelled to express our reservations regarding the extent of this agency's authority to explore some of the constitutional questions raised here. We have frequently grappled with the limits of this agency's jurisdiction and power.[2] Although an adjudicative tribunal in nature, we cannot provide the forum for a

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[2] Jurisdictional limitations in relation to appeal deadlines: Tenn. Atty. Gen. Op. 92-62 (October 8, 1992); *State ex. rel. Hamblen v. Knoxville College,* 60 S.W.3d 93 (Tenn. Ct. App. 200 1); *Homelife Oxygen, LLC* (Shelby County, Final Decision & Order, February 7, 2006); *VN Hotel Investors, LLC v. Tennessee State Board of Equalization,* No. 06-2664- III (Davidson Chancery September 4, 2007); *Hiram Allen* (Wilson County, Final Decision & Order, June 4, 2008); *Memphis Networx. LLC* (Shelby County, Final Decision & Order, January 6, 2009) (Board review pending). Limitations of equalization powers: *Carroll v Alsup,* 64 S.W. 193 (Tenn. 1901); *Mall of Memphis et 01.* (Shelby County, Final Decision & Order, June 29, 1995), aff'd *Mall of Memphis Associates ,'. State Board of Equalization,* No. 02AO1-9609-CH-00214, 1997 WL436222 (Tenn. Ct. App., August 1, 1997) .

constitutional attack on a clear legislative directive. This issue has been recurrent in exemption appeals, which illustrate the problems inherent in constitutional analysis by an administrative tribunal of the very statutes it is charged to enforce. Where the legislature has chosen to create or to remove an exemption, our duty is to determine whether a taxpayer meets the legislature's criteria. We are powerless to excuse a taxpayer's clear failure to meet the legislature's criteria by declaring the statutory mandate unconstitutional as applied to a particular taxpayer. Nor can we refuse to recognize an exemption clearly provided by statute. Such powers are exclusive to the courts of this state.[3]

In the present case, TECO's counsel insists this Commission has the authority to interpret and construe Tenn. Code Ann. § 67-5-1301(a)(13) in accordance with federal constitutional principles, and, at the very least, the authority to make findings of fact; OSAP does not object. [4] We do not perceive the taxpayer's position to constitute, in substance, a facial attack on the constitutionality of the statute. Therefore, with the reservations expressed above, we

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[3] The Board, and this Commission acting for the Board, are limited to 'as applied' constitutional claims. *Colonial Pipeline Company v. Morgan,* 263 S.W.3d 827, 843-46 (Tenn. 2008).

[4] As TECO's counsel observed, this order stems from timely appeals of assessments for given tax years, pursuant to Tenn. Code Ann. §67-5-1328. The Middle Division of the Tennessee Court of Appeals would appear to have jurisdiction over any appeal of the Board's final decision for the tax years in question. Tenn. Code Ann. §4-5-322(b)(1)(B)(iii); *Colonial Pipeline Co.,* 263 S. W.3d at 840-41.

will cautiously undertake the task of examining the constitutional issues, as applied to this taxpayer, and their influence, if any, on our construction of the statute.

Tenn. Code Ann. § 67-5-1301(13), Due Process. Commerce Clause

Tenn. Code Ann. § 67-5-1301(13) requires central assessment of property within the state that is owned, used, and/or leased by certain types of companies, including the following:

> Water transportation companies which operate boats and barges over the waterways of this state for hire, **which are registered** with the United States army corps of engineers or any other federal or state agency **and/or domiciled** in this state **and/or owning or leasing real or personal property** located in this state.

(emphasis added). TECO concedes that it is a water transportation company operating boats and barges over the waterways of this state for hire and that it is registered in accordance with the statute. However, TECO argues it does not fall within the meaning of this statute because it is not domiciled in this state and does not own or lease real or personal property located in this state. TECO argues the first use of "and/or" should be read to mean "and," leaving the reader free to interpret "and/or" to mean what it says in the second instance. As we understand

TECO's position, in order to be subject to assessment under Tenn. Code Ann. § 67-5-1301(13), water transportation companies operating over Tennessee waterways must: (1) be registered, **and** (2) **either** be domiciled in the state **or** own or lease property located in the state (or both).[5]

TECO urges that to interpret or apply the statute otherwise in this case would fall short of the standards enunciated in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977) (upholding fairly apportioned Mississippi sales tax on privilege of providing car carrier services as applied to Michigan corporation engaging in interstate commerce in Mississippi and elsewhere):

> These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate

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[5] *Taxpayer's Brief in Support of Appeal* at 3. At an earlier stage in the process, TECO cited *Sutherland on Statutory Construction* for the proposition that the phrase "and/or" should never be used, which OSAP countered by pointing out over a hundred actual uses of the phrase in Tenn. Code Ann., Title 67, as well as judicial recognition in the courts of other states that the commonly understood meaning of the phrase *"and/or"* is "and" or "or." *Appeal Brief of OSAP* at 4-6.

> **commerce, and is fairly related to the services provided by the State.**

Id. at 279 (emphasis added).

TECO's argument under *Complete Auto Transit* is twofold: (1) that TECO's water transportation carrier activity lacks a substantial nexus with the state; and (2) that the tax is not fairly related to the services provided to TECO by the state.[6]

TECO characterizes its contact with Tennessee as sporadic. Most of TECO's regular traffic within Tennessee's borders takes place over the waterways of the Mississippi River,[7] and most of that traffic originates from and is destined for other states. In 2005, only 17 of TECO's loads that passed through Tennessee along the Mississippi River originated here.

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[6] TECO concedes there is no discrimination against interstate commerce and the tax is fairly apportioned in this case. TECO's *Brief in Support of Appeal* posed an additional challenge to the assessments under the Tonnage Clause. At the hearing, TECO concedes the Tonnage Clause was not violated, and we agree, since the tax at issue here is a fairly apportioned ad valorem tax, not a privilege tax. E.g., *Valdez v. Polar Tankers*, 182 P.3d 614, 622 (Alaska 2008), quoted in *Taxpayer's Brief in Support of Appeal* at 11.

[7] One TECO estimate was that 95-98% of taxpayer's barge traffic in Tennessee was over the waterways of the Mississippi River. *1/7/2007 Transcript* at 11.

TECO claims it receives little or no benefit from Tennessee state, county, or local governments in relationship to its Mississippi River traffic within Tennessee's borders. According to TECO, the waterways of the Mississippi River are maintained and protected by the United States Army Corp of Engineers, the Federal Bureau of investigation, and the Coast Guard. TECO is required to have qualified personnel and equipment on board in the event of a fire on board. In the unfortunate event that a rescue is needed, another boat would be called in for help with no local involvement. TECO asserts it has neither received nor needed any benefit from Tennessee in connection with its Mississippi River traffic.

While there is clearly more local benefit involved in the trips over the Tennessee River waterways, TECO insists the Tennessee River trips are too infrequent to support the tax. In 2005, TECO originated only two loads on the Tennessee River, and its barges were pulled by another carrier in those instances. OSAP counters that the majority of the water transportation carriers that have been centrally assessed by OSAP are not domiciled in Tennessee and do not own or lease property pern1anently located in Tennessee.[8]

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[8] OSAP also discussed the legislative history of Public Acts, 1998, ch. 911 , urging that the amendment was intended to continue the historical practice of centrally assessing registered water transportation companies operating over Tennessee's waterways, regardless of whether domiciled or owning or leasing property located in the state. *Appeal Brief of OSAP* at 6-9.

OSAP argues that under the plain meaning of Tenn. Code Ann. § 67-5-1301(13), water transportation companies are assessable for Tennessee property taxes if they operate for hire over Tennessee waterways and (1) are registered, or (2) domiciled in the state, or (3) own or lease property located in the state. As to constitutional arguments, OSAP acknowledges the *Complete Auto Transit* test, but urges that it does not overrule or conflict with a case more on point, *Ott vs. Miss. Valley Barge Line Co.* , 336 U.S. 169 (1949). OSAP urges that *Complete Aula Transit* does not shift the burden onto a taxing jurisdiction to establish that any particular minimum threshold of contact has been achieved or to establish that state services have actually been rendered to a particular taxpayer, where the tax is fairly apportioned and does not discriminate against interstate commerce.[9] Further,

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[9] OSAP points out that the Court in all both rejected the taxpayer s *de minimis* presence argument, 336 U.S. at 175, and opined that non-domiciliary inland water transportation carriers may be subjected 10 a non-discriminatory and fairly apportioned property tax as follows:

> We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' So far as due process is concerned the only question is whether the tax in practical

OSAP emphasizes the Court's rejection of the taxpayer's nexus argument in *Central R.R. Co. of Pa.*, 370 U.S. 607, 616 (1962), and the Court's discussion of the relationship to state services in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (upholding coal severance tax on in-state mining companies, where most of the coal was shipped to customers in other states):

> When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'"

> operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

Ott, 336 U.S. at 174 (citations omitted). See also *Standard Oil Co.*, 342 U.S. at 383-84 (recognizing that *Ott* placed water transportation on the same constitutional footing as other interest enterprises, such as railroad carriers; *Pullman's Palace Car Co. v. Commonwealth of Pa.*, 141 U.S. 18 (1891) (upholding apportioned capital stock tax on Illinois rail carrier property, declining to extend home port doctrine, later explicitly recognized as obsolete in *Ott*, to rail carriers).

Id. at 627.[10]

We agree with OSAP's analysis of the Due Process and Commerce Clause issues raised by TECO. We note that there have been few cases, if any, in which state taxes implicating interstate commerce have been struck down on the grounds that the benefits provided by the taxing jurisdictions were insufficient.[11] The opportunities, benefits, and protections offered by states are not limited to direct police and fire protection.

Regardless of whether non-federal authorities would respond or ever have responded in the event of a disaster on the water for TECO or any other similarly-situated taxpayer, Tennessee and her subdivisions offer a number of potential opportunities, benefits, and protections to companies like TECO, including but not limited to safe places to seek refueling and repairs, access to courts and legal institutions, and a more civilized society and environment along the shores than would be likely without her. It is not necessary to show TECO's actual exercise of such benefits or opportunities, nor is it necessary to show a correlation between the amount of the tax and the benefits inuring to any particular taxpayer:

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[10] Quoting *Exxon Corp v. Wis. Dept. of Rev.* , 447 U.S. 207 (1980) (upholding apportioned income tax that included income from out-of-state oil and gas extraction, exploration, and production operations in addition to in-state marketing opera lions), *Japan Line.* 441 U.S. 434 (1979).

[11] See, e.g., *Jack Cole Co. v. Ellington,* 372 S. W. 2d 204 (Tenn. Ct. App. 1961).

> ...[T]he linchpin of appellant's contention is the incorrect assumption that the amount of state taxes that may be levied on an activity connected to interstate commerce is limited by the costs incurred by the State on account of that activity. Only then does it make sense to advocate judicial examination of the relationship between taxes paid and benefits provided. But as we have previously noted... interstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct "benefit."

Commonwealth Edison Co. , 453 U.S. at 627-28, fn. 16 (declining to construe *Complete Auto Transit* test as requiring factual inquiry into relationship between revenues generated by a tax and costs incurred by the taxing jurisdiction). Tennessee and her subdivisions must also shoulder substantial potential burdens that result from risks inherent in water transportation carrier activity within Tennessee's borders, as for example, when a vessel hits a bridge or a spill occurs. It is not relevant

whether TECO was or will be actually involved in such an incident.[12]

While the Commission agrees that Tenn. Code Ann. § 67-S-1301(13) could have been more artfully drafted, we do not believe that the use of "and/or" is unusual or has a cryptic meaning in the context of tax statutes. We hold that water transportation companies operating over Tennessee waterways for hire are assessable if they are: (1) registered, or (2) domiciled in the state, or (3) owning or leasing property located in the state (or any combination of the three).

The cardinal rule of statutory construction is that legislative intent is ascertained from the natural and ordinary meaning of the statutory language whenever possible. *State ex rel. Davis v. A&F Const.*, No. M2008-00360-COA-R3-CV, 2009 WL 499421 (Tenn. Ct. App., Feb. 26, 2009).[13] In our view, the disjunctive terminology in Tenn. Code Ann. § 67-5-1301(13) chosen by the legislature plainly indicates its intent that water transportation

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[12] See, e.g., *City of Valdez*, 182 P.3d at 618 (recognizing Exxon Valdez oil spill in upholding local apportioned property tax on tanker vessels of Conoco Philips subsidiary).

[13] See also *Colonial Pipeline Co.*, 263 S.W.3d at 836; *Eastman Chemical Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004); *First Presbyterian Church of Chattanooga v. Tennessee Board of Equalization*, 127 S.W.3d 742, 749 (Tenn. Ct. App. 2003); *Schering-Plough Healthcare Products v. State Board of Equalization*, 999 S.W.2d 773, 775-76 (Tenn. 1999); *Eusco, Inc. v. Huddleston*, 835 S.W.2d 576, 580 (Tenn. 1992); *Parkridge Hospital v. Woods*, 561 S.W.2d 754, 755 (Tenn. 1978).

carriers operating within Tennessee for hire be centrally assessed, so long as they are at least registered, or domiciled in Tennessee, or owning or leasing property located in Tennessee.[14] There is no ambiguity here.

Before the Commission and at the earlier administrative judge proceeding, counsel for OSAP cited the legislative record of 1998 amendments to § 67-5-1301(13). TECO did not rebut OSAP's contention that the 1998 amendment was not intended to substantively change the prior definition that plainly included certificated companies operating over Tennessee waterways regardless of domicile or ownership of property in Tennessee. Appeal Brief of OSAP, pp. 6-8. That was also, apparently, the recollection of the OSAP administrative staff. Deposition of Gary T. Harris, CAE, pp. 13-14.

Tax Years 2003-2004 Back Assessments/ Reassessments. Selective Enforcement

As to tax years 2003-2004, TECO also argues that OSAP's back assessments of TECO did not comport with the First Amendment or Equal Protection under the Fourteenth Amendment. TECO points out that the back assessment notice was issued on August 11, 2006, subsequent to TECO's

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[14] Compare Tenn. Code Ann. §67-5-1301(13) and Tenn. Code Ann. §67-5-1301(11), requiring registration and either domicile, owning or leasing property located in the state, or both, in order for motor bus and truck companies to be centrally assessable.

appeal of the 2005 assessment. To support the idea that it was not a bad actor or a renegade taxpayer, TECO points out letters from its counsel as early as 2000 in which TECO claimed not to be assessable by OSAP under a theory similar to that argued and rejected today.[15] To support the notion that it was treated differently than other carriers, TECO states that eight carriers, other than TECO, were added to OSAP's assessment rolls in 2004 and 2005 and were not back assessed. TECO also references deposed OSAP employees' lack of memory about conversations with TECO's counsel and lack of awareness and/or memory regarding whether or under what circumstances other carriers had or had not been back assessed.

TECO argues that OSAP's back assessments/reassessments of TECO were retaliatory, based on TECO's appeal, in violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

We do not find sufficient proof to establish a constitutional violation. We believe the assertion

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[15] *Exhibit* 3 from the administrative judge hearing, a letter dated *7/25/2000* from TECO's (then Mid-South Towing Company's) counsel to an OSAP analyst references a prior telephone conversation, indicating his "understanding" that Mid-South would not have to prepare and file a schedule with OSAP based on the representation that the company "does not own or lease any property in the state of Tennessee." *Exhibit* 4, a letter dated 6/3/2002 from TECO's counsel to an OSAP analyst reflected a similar understanding by TECO's counsel.

that OSAP's actions were vindictive or selective [16] is not borne out by the record. The proof does not establish that TECO was singled out by OSAP and does not establish that OSAP's actions rested on an impermissible consideration or purpose. Nor can OSAP be estopped from carrying out its duty under Tenn. Code Ann. § 67-5-1301(c), 67-1-1002(a)(1), and 67-1-1 005(a) on the basis of presumably innocent misinterpretations of the statute by its employees and/or TECO.[17]

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[16] Under the first element of a selective (or vindictive) enforcement claim, it appears TECO would be required to allege and prove: (1) that other non-regulated offenders have engaged or are engaging in essentially the same conduct, (2) that the non-regulated offenders violated the same regulation, statute, or ordinance that the claimant is accused of violating, and (3) that the magnitude of the non-regulated offender's violation was not materially different from that of the plaintiffs. *421 Corp.* v. *Metro Gov't*, 36 S.W.3d 469, 480-81 (Tenn. Ct. App. 2000). And under the second element, it appears TECO would also have to allege and prove that OSAP's action was intended to deter or punish the exercise of a protected right, such as the right to appeal its assessment *Id.*

[17] *Porter Brown Limestone Co., Inc. v. Olson,* 648 S.W.2d 242, 244 (Tenn. 1982), *Exchange Mut. Ins. Co. v. Olson,*667 S.W.2d 62 (Tenn. 1984), *Tennessee Farmer's Assur. Co. v. Chumley,* 197 S.W.3d 767, 779-80 (Tenn. Ct. App. 2006) (recognizing that employee errors and agreements with taxpayers do not estop agency from carrying out duty to collect taxes legally due); *421 Corp. v. Metro Gov 't,* 36 S. W.3d at 480 (recognizing heavy burden of claimant of vindictive enforcement, presumption that public officials discharge duties in good faith, discretion in enforcement that must be afforded due to lack of resources. absence of constitutional right to have laws go unenforced). See also, *Siegel v. Holland.,* 102 S. W.2d 1028 (Tenn. 1937).

Chairman Stokes and Commissioner Wade dissent regarding the selective enforcement claim (statement attached).

ORDER

It is therefore ORDERED, that the initial decision and order of the administrative judge is affirmed in all respects and that the assessments and back assessments are upheld. This order is subject to:

1. Reconsideration by the Commission, in the Commission's discretion. Reconsideration must be requested in writing, stating specific grounds for relief and the request must be filed with the Executive Secretary of the State Board within fifteen (15) days from the date of this order.
2. Review by the State Board of Equalization, in the Board's discretion. This review must be requested in writing, state specific grounds for relief, and be filed with the Executive Secretary of the State Board within thirty (30) days from the date of this order.
3. Review by Tennessee Court of Appeals, Middle Division, pursuant to Tenn. Code Ann. § 4-5-322(b)(1)(B)(iii), filed within sixty (60) days from the date of the official assessment certificate which will be issued when this matter has become final.

Requests for stay of effectiveness will not be accepted.

DATED: June 18, 2009

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Presiding member

ATTEST:

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Executive Secretary

STATEMENT OF DISSENT

We concur with the majority on the applicability of Tenn. Code Ann. § 67-5-1301(13) to TECO and the constitutionality of the assessments as applied to TECO for tax years 2005 and following.

However, we respectfully disagree with the majority's conclusion that the back assessments for tax years 2003 and 2004, as applied to TECO under the circumstances presented, were constitutionally sound. In our opinion the circumstances established by TECO shifted the burden of rebutting selective enforcement to OSAP which could not then stand solely on its assertion of a duty to back assess. The presentation by TECO's counsel created a reasonable inference that the back assessments were, at the least, arbitrary, and perhaps, retaliation for TECO's exercise of its appeal rights.

DATED: June 18, 2009

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Presiding member

ATTEST:

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Executive Secretary

APPENDIX D

BEFORE THE
TENNESSEE STATE BOARD OF EQUALIZATION

In Re: TECO Barge Line, Inc.
n/k/a United Barge Line, LLC
Back Assessment 2003 & 2004
Public *Utility*
Tax Years 2005 and 2006

INITIAL DECISION AND ORDER

Statement of the case

TECO Barge Line, Inc. n/k/a United Barge Line, Inc. hereinafter referred to as "TECO/United") is a public utility taxpayer. During tax year 2005, pursuant to T.C.A. § 67-5- 1315, [1] the Office of State

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[1] TCA § 67-5-1315. Water transportation carrier companies.

> In addition to the information required by 67-5-1303, the schedules and statements submitted by water transportation carrier companies which are assessed by the comptroller of the treasury shall include:
>
> (1) The number, type, kind, and cost of all barges, tugs and other equipment used by the company; (2) The gross revenue, tons originated and terminated, and tons hauled in the system and the state; and (3) the location, cost and value, and the description all property, real and personal, operating within, from, or through this state.

Assessed Properties ("OSAP") directed the taxpayer to file a property tax statement. Notwithstanding its position that it was not subject to property taxation in Tennessee, TECO/United complied. Shortly after the 2005 assessment was received, TECO/United also received a back assessment/reassessment notice for tax years 2003 and 2004.

This hearing was held in Nashville, Tennessee on January 7, 2008. TECO/United was represented by Attorney Everett Gibson of Bateman Gibson, LLC. Attorney John C. Allen represented OSAP. TECO/United is contesting the payment of ad valorem taxes for tax years 2005 and 2006, as well as back assessments for tax years 2003 and 2004 pursuant to T.C.A. § 67 -5-1301(a), which reads in pertinent part:

> T.C.A. § 67-5-1301. Assessment by comptroller of the treasury.
>
> (a) The comptroller of the treasury is authorized and directed to assess for taxation, for state, county, and municipal purposes, all of the properties of every description, tangible and intangible, within the state, owned by and all personal property used and/or leased by the following named persons hereinafter referred to as companies, namely: (Emphasis supplied)

(13) Water transportation carrier companies which operate boats and barges over the waterways of this state for hire, which are registered with the United States army corps of engineers or any other federal or state agency and/or domiciled in this state and/or owning or leasing real or personal property located in this state.
(Emphasis supplied)
(b) The comptroller of the treasury shall assess all of such property annually as of the same date as other properties are assessed by law; provided, that this part shall not apply to corporations organized under the laws of Tennessee whose principal business is the manufacture of products of the soil of Tennessee and who for the transportation alone of such products furnish their own cars.

(c) Remedies generally available for the correction of assessment errors for locally assessed properties, 67-5-509, back assessments or reassessments of locally assessed properties, chapter 1, part 10 of this title, amendment of taxpayer reporting schedules, 67-5-903, and confidentiality of information, 67-5-402, shall be likewise applicable to

> assessments of public utility companies pursuant to this part, except that the comptroller of the treasury shall act as the assessing authority, and the actions of the comptroller of the treasury shall be subject to review directly by the state board of equalization.

Issues presented on Appeal

The issues in this appeal are arguments advanced by TECO/United that it does not fall within the statutory definition of a "water transportation company" for ad valorem taxation purposes and that there is an in sufficient nexus to assess it in the State of Tennessee. TECO/United established through its testimony and filed exhibits that, out of the 700+ barges that it owns and operates, only 20 (+/-) are used to traverse the Mississippi River as it flows through the state of Tennessee . Through the testimony of Mr. David O'Neil, President of United Barge Line, LLC and past president of TECO Barge Line, Inc., the taxpayer established that none of its barge routes terminate in the State of Tennessee. Mr. O'Neil stated that they just "travel" up and down the river on their way to or from a destination that is not in this state. Mr. O'Neil testified that, after further perusal of the records of the company, only about 17 cargos originated in Tennessee out of a system wide

number of 5,561 originations [2] in tax year 2005. Attorney Gibson argued that one of the purposes of the taxation process is to support and pay for certain services within a State.[3] It is TECO/United's position that the type of services usually paid for by tax revenues does not directly benefit the taxpayer's barges. The taxpayer argues that the waterways are federal waterways and are maintained and serviced by the United States Corp of Engineers. If something were to occur onboard one of the barges, e.g., fire or theft, the United States Coast Guard would be called upon to resolve the issue or, as is in the matter of illegal activity, the Federal Bureau of Investigation. Mr. O'Neil testified that, during the time the taxpayer has been in operation, he could not remember a time that a local resource, e.g ., police or fire department, had been called upon to render aide or assistance to one of taxpayer's barges. Therefore, the taxpayer argues, to require them to pay these taxes would violate the long-standing rule enunciated in Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, at 202 (1905):

> The power of taxation, indispensible to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and

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[2] Mr. O'Neil estimates that this works out to be 2 or 3 ten the of 1 %.(Hearing transcript pg.12, line 12)

[3] E.g., Police protection, fire services, etc. (Hearing transcript pgs 13 through 16).

> properly, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his Children. *If the taxing power be in no position to render theses services, or otherwise to benefit the person or property taxed,* and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion that an tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law. (Fullher citations omitted)

The same "general rule" is followed in several jurisdictions, including Pennsylvania, New York, Utah, Maryland, California and Mississippi. TECO/United argues that, to allow such taxation, would violate the due process clause of the fourteenth amendment and the commerce clause of the United States Constitution. This administrative judge has often cited the following Tennessee cases in making a determination as to the legal obligation of a taxpayer:

> It is a fundamental rule that all property shall be taxed and bear its just share of the cost of government, and no property shall escape this common burden, unless it has been duly exempted by organic or statute law; and that one claiming such exemption has the burden of showing his right to it. 2 Cooley on Taxation 4th Ed. sec. 672; American Bemberg Corp. v. Elizabethton, 180 Tenn. 373, 378, 175 S.w.2d 535; American Nat. B. & T. Co. of Chattanooga. v, MacFarland, 209 Tenn. 263, 352 S.w.2d 441 , 443, 444. (Emphasis supplied)

> Taxes are the life blood of civil government. The right of taxation is an attribute of sovereignty. It is inherent in the state, and essential to the perpetuity of its institutions; consequently he who claims exemption must justify his claim by the clearest grant of organic or statute law. Knoxville & O. R. Co. v. Harris, 99 Tenn. 684,693, 43 S.W. 115, (Tenn. App., 1897)

It appears that it is the position of "United" that, while a taxpayer has an obligation to pay taxes, the State has a responsibility to provide services to the taxpayer, a "quid pro quo", if you will; and, without one, you should not have the other. The

position of OSAP is clear as well. In his post-hearing brief, Attorney Allen argued that "to accept the arguments advanced by 'United' would permit water transpiration companies to escape taxation by merely stating that such [sic] company is not domiciled or does not own or lease property" in Tennessee. Attorney Allen contends that "a company like TECO/ (United) may be made to pay a nondiscriminatory tax based upon tile commerce carried on within the borders of a state like Tennessee". Counsel for OSAP goes on to argue that, when you apply the natural and ordinary meaning of the words employed in T.CA § 67-5-1301(a)(13), it is evident that TECO/United is assessable for ad valorem taxation purposes in Tennessee.

In analyzing the pertinent statutes with the appropriate case law, it is revealed that the basic principal of statutory construction is "to ascertain and give effect to legislative intent without unduly restricting or expanding the intended scope of a statute". State ex. rel. Pope v. U.S. Fire Ins., Co., 145 SW .3d 529,534 (Tenn. 2004).

In the opinion of this administrative judge, tile statute in question appears, upon examination, to be "natural and ordinary" [4] in meaning, not convoluted in its meaning or purpose. It states quite clearly that:

> (13) Water transportation carrier companies which operate boats and barges over the waterways of this

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[4] *Washington v Robertson County* 29 S.W. 3d 466,471 (Tenn.2000).

> state for hire, which are registered with the United States army corps of engineers or. Any other federal or state agency and/or domiciled in this state and/or owning or leasing real or personal properly located in this state. (Emphasis supplied)

It is established through the testimony of Mr. O'Neil that "United" transverses over the Mississippi River through the state of Tennessee,[5] as well the use of the Tennessee River[6], The barges operated by the taxpayer carries products such as coal, aggregate grain, grain related [items] and steel. [7] Additionally, while a relatively small number of cargo barges operated by the taxpayer originate in Tennessee,[8] the statute does not require that a quantitative threshold be reached before the statute becomes applicable. It clearly states, as noted above, that "companies which operate boats and barges over the waterways of this state for hire" are to be assessed for taxation. The taxpayer in this case clearly falls within this classification.

TECO/United also makes the following argument that it is being discriminated against:

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5 *Hearing transcript*, pgs 9, 10.

6 *Hearing transcript*, pg. 11.

7 *Hearing transcript*, pg. 9.

8 Calculated out to be "two or three tenths of one percent."

> No other water transportation carrier that has filed a property tax report for the first time in a given tax year was back assessed for an earlier year. For example, in tax year 2000, OSAP added four water transportation carriers to it assessable master listing, Hartley Marine Corp., Marquette Transportation Co. Inc., Memphis Queen Company and Petroleum Transfers Inc. None of these four taxpayers was back assessed.[9]

The State of Tennessee has the statutory authority to back assess any taxable asset that has been omitted from or has totally escaped taxation under T.CA § 67-1-1001(a)(1). According to OSAP's argument, TECO/United has escaped taxation for almost twenty-four years while other "water transportation carrier companies" were being assessed. In the opinion of this administrative judge, TECO/United's argument is without merit. The authority clearly lies with the taxing agency [10] to issue the back assessment as it has done.

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[9] Taken from Taxpayer's Statement in Support of its Equal Protection Defense filed January 7, 2008.

[10] T.C.A § 67-1-10:

(a) Any property or properties included in this part or chapter 5 of this title shall be back assessed or reassessed for the period

Next, TECO/United alleges that OSAP's back assessment is a form of selective enforcement or retaliation used in an attempt to punish TECO/United for pursuing an appeal before an administrative judge. This administrative judge also finds this argument to be without merit. The mere fact that OSAP is taking an adverse position is not indicative of retaliation. Furthermore, there is certainly no proof that the State of Tennessee has or is seeking to violate the taxpayers rights under the Equal Protection Clause.

While TECO/United's contention that it receives no benefit or services from the State of Tennessee[11] is somewhat credible, the taxing statute does not make a taxpayer's receipt of a benefit or services from a taxing authority a prerequisite for tax liability. The statute only requires that the "water transportation carrier" company "operate boats and barges over the waterways of this state for hire"; "and/or" be "domiciled in this state"; "and/or" own or lease "real or personal property located in this state." [12] In the opinion of this administrative judge, TECO/United meets this criteria and, therefore, this argument by the taxpayer also fails.

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provided by law, viz.: (1) When the property or properties have been omitted from or escaped taxation; ....

[11] ¶13 under Conclusions of Law in the Taxpayer's Proposed Findings of Fact on Conclusions of Law filed February 8, 2008.

[12] T.C.A. § 67-5-1301(a)(13).

Under the analysis proffered by the attorney for OSAP in his Reply Statement of TECO Barge, Inc. in support of Ad Valorem Tax filed on January 31, 2006, the tax liability for TECO/United is established for tax years 2005 and 2006 through a clear reading of the statute. Therefore, OSAP argues, the fact that TECO/United had been overlooked in past years does not insulate it from the State going back to recover the taxable amounts for tax years 2003 and 2004.

The reading of the statute shows that the Legislature clearly intended for companies like TECO/United to be liable for traveling "over" the waterways of this State. The fact that the State is only now pursuing these taxpayers could be attributed to several internal reasons. The case law is replete with cases that examine claims of retaliatory action or selective enforcement by the State and all basically hold that:

> "persons making selective enforcement claims have a heavy burden to overcome because the courts, in recognition of the doctrine of separation of powers, presume that public officials have discharged their duties in good faith", Williams v. American Plan Corp., 216 Tenn. 435,441 , (1965) and "in accordance with the law." Reeder v. Holt, 220 Tenn. 428, 435-36 [Emphasis supplied]

As well as:

> Persons asserting a selective enforcement claim must prove that the regulatory enforcement had a discriminatory purpose and produced a discriminatory effect. United States v. Armstrong, 517 U.S. 456, 466 (1996) [Emphasis supplied]

And finally:

> There are two elements to a selective enforcement claim: (1) the government has singled out the plaintiff for adverse regulatory or enforcement action while others engaging in Similar activity have not been subject to the same type of action and (2) that the decision to prosecute them rests on an impermissible consideration or purpose. National Loans, Inc. v. Tennessee Dep't of Fin. Institutions, 1997 Tenn. App. LEXIS 276, 1997; 421 Corp. et. al v. Metro Government of Nashville etc ., 36 SW.3d 469, Tenn. App (2000) [Emphasis supplied]

Therefore, as to its "selective enforcement" or "retaliation" argument, TECO/United has failed to

meet that burden or prove that the decision to enforce the back assessment statute rested on any "impermissible consideration or purpose" on the part of the State.

Order

Based on the foregoing analysis, it is the opinion of this administrative judge that TECO/United is liable for the ad valorem taxes for tax years 2005 and 2006, as well as the back assessment for tax years 2003 and 2004.

IT IS FUTHER ORDERED that any applicable hearing costs be assessed pursuant to Tenn. Code Ann. § 67-5-1501(d) and State Board of Equalization Rule 0600-1-.17.

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301-325, Tenn. Code Ann. § 67-5-1501, and the Rules of Contested Case Procedure of the State Board of Equalization, the parties are advised of the following remedies:

1. A party may appeal this decision and order to the Assessment Appeals Commission pursuant to Tenn. Code Ann. § 67-5-1501 and Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization. Tennessee Code Annotated § 67-5-1501(c) provides that an appeal "must be filed within thirty (30) days from the date the initial

decision is sent." Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization provides that the appeal be filed with the Executive Secretary of tile State Board and that the appeal "identify the allegedly erroneous finding(s) of fact and/or conclusion(s) of law in the initial order"; or

2. A party may petition for reconsideration of this decision and order pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of tile entry of the order. The petition for reconsideration must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.

This order does not become final until an official certificate is issued by the Assessment Appeals Commission. Official certificates are normally issued seventy-five (75) days after tile entry of the initial decision and order if no party has appealed.

ENTERED this 25th day of November, 2008.

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ANDREI ELLEN LEE
ADMINISTRATIVE JUDGE
STATE BOARD OF EQUALIZATION